

17
JUL 11 1944

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1943.

No. 246

NEW YORK STATE GUERNSEY BREEDERS'
CO-OPERATIVE, INC.,

Petitioner,

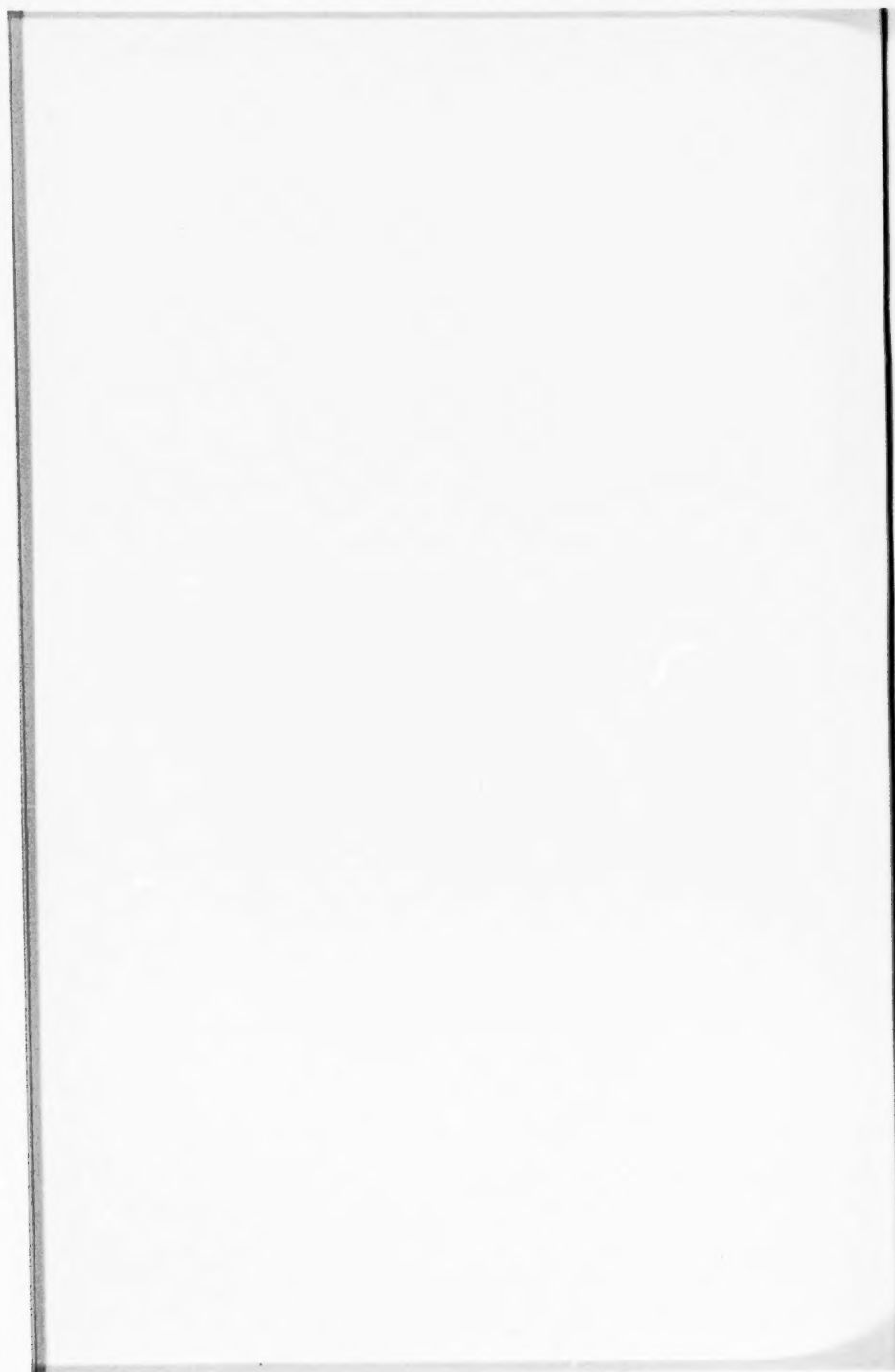
against

CLAUDE R. WICKARD, Secretary of Agriculture of
the United States of America.

**PETITION FOR WRIT OF CERTIORARI TO THE CIR-
CUIT COURT OF APPEALS, SECOND CIRCUIT,
AND BRIEF IN SUPPORT THEREOF.**

MERRITT A. SWITZER,
Attorney for Petitioner,
Office and Post Office Address,
Post Office Building,
Pulaski, New York.

IRVING G. HUBBS,
MILO R. KNIFFEN,
Of Counsel.



INDEX

	PAGE
Statement of Case	2
Opinions Below	3
Jurisdiction	3
Statutes Involved	3
Summary Statement of Matters Involved	6
Question Presented	8
Reasons Relied on for Allowance of Writ	8
Brief Supporting Petition	10
Introduction	10
A. Equalization in Secretary's Order No. 27 deprives Petitioner of Property without Due Process of Law	11
1. Property Rights Involved in the Production of Guernsey Milk	12
2. Infringement of Those Rights through Equal- ization	13
a. Operation of Plan and its Effect	13
b. Failure of 4¢ butterfat differential to meet expense of producing high test milk	15
(1) Historical background of butterfat dif- ferential	15
(2) Arbitrary 4¢ unrelated to production cost or market	15
(3) Adjustable butterfat differential in other milk marketing areas	16
B. Plaintiff Is Therefore Entitled to Preferential Treatment in the Order or Exemption from Equal- ization	16
1. Constitutional Rights of Minority Groups un- der the Order	17
2. Constitutionality of the Act and Order No. 27 ..	17

II.

	PAGE
3. Method of Correction Prescribed in the Act . . .	20
4. Duty of the Court upon Secretary's Failure to Grant Relief	22
5. Grant of Relief to the Petitioner as Affecting Milk Production and Marketing	23
Conclusion	25

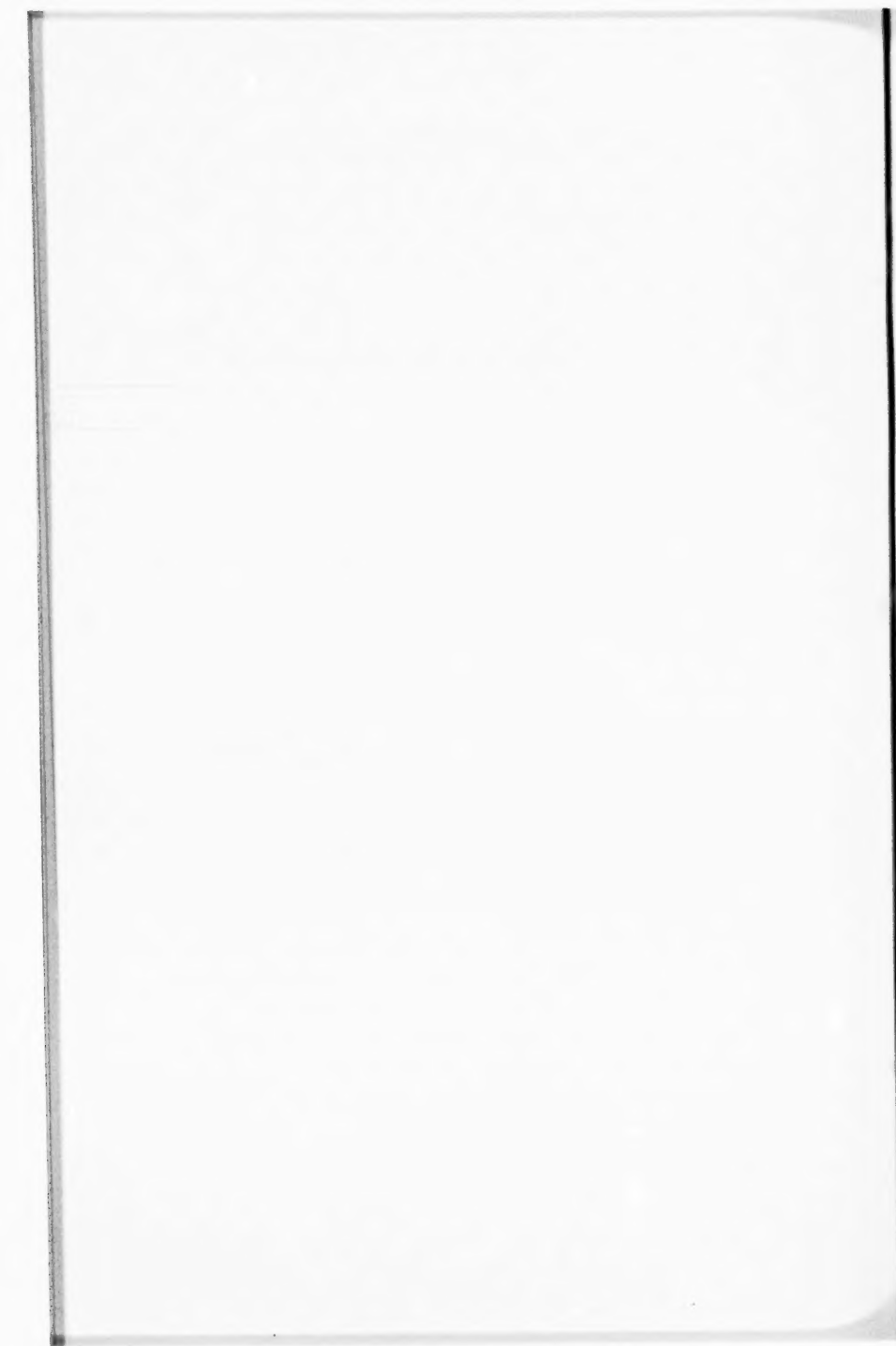
TABLE OF CASES CITED.

Abie State Bank vs. Bryan, 282 U. S. 765	20
Anniston Mfg. Co. v. Davis, 301 U. S. 337	22
Averne Bay Construction Co. vs. Thatcher, 278 N. Y. 222	20
Baldwin vs. Seelig, 294 U. S. 511	10
Borden's Farm Products Co. vs. Ten Eyck, 297 U. S. 251	10
Hegenan Farms Corporation vs. Baldwin, 293 U. S. 163	10
H. P. Hood Sons vs. United States, 307 U. S. 593	18
Nashville & Etc. Co. vs. Walters, 294 U. S. 405	20
Nebbia vs. New York, 291 U. S. 502	10
New York State Guernsey Breeders' Co-Operative, Inc. vs. Noyes, 284 N. Y. 197	9, 14, 23
New York State Guernsey Breeders' Co-Operative, Inc. vs. Noyes, 266 App. Div. 462; app. dismissed, 291 N. Y. 704	9
Queensboro Farm Products, Inc. vs. Wickard, 137 Fed. 2d 969	19
Stark vs. Wickard, U. S., 88 Law Ed. 511 . .	17, 19
United States vs. Adler's Creamery, 107 Fed. 2d 988 . . .	19
United States vs. Rock Royal Co-op. Inc., 307 U. S. 533	8, 9, 10, 18
United States vs. Whiting Milk Co., 21 Fed. Supp. 321	18
Waddington Milk Co., Inc. vs. Wickard, 140 Fed. 2d 98	19
Yick Wo vs. Hopkins, 118 U. S. 356	20

III.

TABLE OF STATUTES.

	PAGE
Judicial Code 28 U. S. C. §347	3
Agricultural Marketing Agreement Act of 1937, 7 U. S.	
C. §601 <i>et seq.</i>	3
Agricultural Marketing Agreement Act of 1937, 7 U. S.	
C. §602	22
Agricultural Marketing Agreement Act of 1937, 7 U. S.	
C. §608c (1)	3, 6
Agricultural Marketing Agreement Act of 1937, 7 U. S.	
C. §608c (2)	4
Agricultural Marketing Agreement Act of 1937, 7 U. S.	
C. §608c (5)	4, 20
Agricultural Marketing Agreement Act of 1937, 7 U. S.	
C. §608c (15A)	5, 6, 22
Agricultural Marketing Agreement Act of 1937, 7 U. S.	
C. §608c (15B)	5, 6, 22
Agricultural Marketing Agreement Act of 1937, 7 U. S.	
C. §608c (18)	5, 9
Constitution of the United States, Fifth Amendment ...	17



Supreme Court of the United States

October Term, 1943.

No.

NEW YORK STATE GUERNSEY BREEDERS'
CO-OPERATIVE, INC.,

Petitioner,

against

CLAUDE R. WICKARD, Secretary of Agriculture of
the United States of America.

*To the Chief Justice and Associate Justices of the Supreme
Court of the United States:*

The petitioner above-named, represented by Merritt A. Switzer, its attorney, respectfully prays that a writ of certiorari be issued from the Supreme Court of the United States, directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify for review and determination a transcript of the record and all proceedings in the case numbered and entitled on its docket No. 244, October Term, 1943, New York State Guernsey Breeders' Co-operative, Inc., plaintiff-appellant, v. Claude R. Wickard, Secretary of Agriculture of the United States of America, defendant-appellee, and that the judgment of

the Circuit Court of Appeals and the judgment of the District Court may be reviewed and reversed, and that the petitioner may have such other and further relief as may be just and proper.

Statement of the Case.

This suit was brought by petitioner by a bill in equity to review a ruling of the Secretary of Agriculture denying its petition for relief from the equalization provisions of Order No. 27, issued by the Secretary, regulating the handling of milk in the New York milk marketing area, or for an amendment to the order providing for a differential in its favor. The petitioner bases its claim for relief upon the fact that it is a co-operative association of farmers producing milk from Guernsey herds which it sells in that marketing area, that the milk which it sells is of a superior quality not adequately compensated for under Order provisions, and that an adjustment for the "grade or quality of the milk delivered" by it should have been made.

The issues presented by the original complaint, answer and reply were heard on motions for summary judgment. The District Court, Northern District of New York, Hon. Frank Cooper, D. J., handed down an opinion (R. 19-78) upon which findings of fact and conclusions of law (R. 79-106) and an order denying motions for summary judgments and remanding the matter to the Secretary of Agriculture (R. 107-110) were filed. A reopened hearing was held before a duly designated representative of the Secretary and thereafter a decision was handed down by the Secretary, again denying plaintiff's petition. An amended and supplemental complaint (R. 182-222) was served, which was met by an answer to amended and supplemental complaint

(R. 223-258), a reply was served (R. 272-291), and upon motions for summary judgment the matter was heard before Hon. Frederick H. Bryant, D. J., the decision being for the defendant. Findings of fact and conclusions of law were made (R. 319-333) and a final judgment (R. 334-341) was entered. Upon appeal by the plaintiff (R. 341-343) the Circuit Court of Appeals affirmed.

Opinions Below.

The opinion of Cooper, D. J., is unreported but is printed in the record (R. 19-78). The opinion of Bryant, D. J., (R. 291-318) is likewise unreported. The opinion of the Circuit Court (R. pp. 135-145) is reported in 141 Fed. 2d 805.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on April 17, 1944, (R. pp. 146-147). The jurisdiction of the Supreme Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, (U. S. C. A., Title 28, Sect. 347).

Statutes Involved.

The Federal Act directly involved is the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U. S. C. 601 *et seq.*, and particularly 608e thereof, which provides in part, as follows:

- (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. * * *

(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof or to any regional or market classification of any such commodity or product: Milk, * * *

* * *

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing minimum prices for each such use classification which all handlers shall pay and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

* * *

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered: subject, in either case, only to adjustments for (a) volume, market and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

Also involved are Sects. 608c (15)(A) and (B) and (18) which provide as follows:

(15)(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States * * * in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling. * * * If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. * * *

(18) The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, shall ascertain * * * the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period. The level of prices * * * shall, for the purposes of such agreement, order or amendment, be such level as will reflect the price of feeds, the available supplies of feed and other economic conditions which affect market supply and demand, for milk or its products in the marketing area to which the * * * order or amendment relates. * * * he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. * * *

Summary Statement of Matters Involved.

The Secretary of Agriculture, acting under powers conferred by Section 608c, on Aug. 5, 1938, issued Order No. 27, regulating the handling of milk in the New York milk marketing area. Petitioner is a co-operative association of dairy farmers producing milk from Guernsey herds, which it markets in the marketing area. At promulgation hearings held prior to the issuance of the order, the petitioner, believing itself entitled to an adjustment for "the grade or quality of the milk" sold by it, petitioned for relief from the equalization provisions of the proposed order or for an amendment providing for a differential in its favor. The order as promulgated contained no provision making any adjustment for quality other than a butterfat differential and a Grade A premium, which latter premium was afterwards discontinued. After promulgation of the order and a demand for a large amount claimed by the Market Administrator to be due the producer-settlement fund on milk handled by it during the first month the order was in effect, it petitioned under Section 608c (15) (A), praying for a modification of the order or exemption therefrom. Hearings were held and its petition denied. It thereupon commenced this action pursuant to Section 608c (15) (B).

Issues presented by the original complaint, answer, counterclaim and reply were heard before Honorable Frank Cooper, United States District Judge, on motions for summary judgment. Findings were made sustaining petitioner's contention that its milk is of a superior quality, not adequately compensated for under Order provisions, and the court concluded as a matter of law that the Secretary's findings and conclusions were not in accordance with the evidence at the hearing before him, and that upon the evi-

dence and according to law the Secretary should have made an adjustment, by exemption or differential, which would adequately recognize the quality of petitioner's milk.

The matter was remanded to the Secretary to make new findings of fact and conclusions upon the evidence and to grant or deny plaintiff's proposed findings and conclusions, with the right to make new or additional findings, and with the right of each party to submit additional evidence.

After entry of judgment based upon such findings and conclusions of law, the Secretary held further hearings and made another determination again denying petitioner's claim for a differential. Thereupon, by order of the District Court, petitioner was permitted to serve an amended and supplemental complaint. The Secretary served an answer to the amended and supplemental complaint which contained an amended and supplemental counterclaim, a reply was served by the petitioner, and the matter was heard before Honorable Frederick H. Bryant, United States District Judge, again upon motions for summary judgment. He found in favor of the Secretary and made an order dismissing the amended and supplemental complaint.

The Secretary's counterclaim is for moneys claimed to be due the producer-settlement fund on milk on which petitioner believes itself entitled to an adjustment for quality. It is on deposit subject to court order pending termination of this litigation and Judge Bryant granted judgment directing payment of such money to the Market Administrator.

Petitioner appealed to the Circuit Court. That Court has affirmed the decision of the District Court.

Question Presented.

Does the refusal of the Secretary to provide an appropriate adjustment or differential in favor of petitioner to compensate it for the grade or quality of the Guernsey milk it delivers or to relieve the petitioner from the equalization provisions of Order No. 27 constitute a violation of the Due Process Clause of the Fifth Amendment of the Constitution of the United States or is such refusal otherwise contrary to law?

Reasons Relied on for Allowance of the Writ.

A.

The courts below have decided such constitutional question in the negative. In so doing they have indicated that they consider themselves bound by the decision of this Court in *United States vs. Rock Royal Co-op., Inc.*, 307 U. S. 533, thereby giving to that decision an effect beyond the scope of the issues there determined.

B.

It is the contention of the petitioner that it is entitled under the Act to the benefit of an Order provision which will allow it adequate compensation for the quality of its product, and that if the Act does not require the inclusion of such a provision in the Order, then, as to it, the Act itself is unconstitutional and void as depriving it of property without due process of law. This is an issue hitherto undetermined by this court with respect to the Act in question or the Order which has been promulgated under the asserted authority of the Act.

C.

The courts below have assumed a state of facts wholly unwarranted by the evidence and upon the basis of that assumption have rendered decisions which tend to nullify the purposes of Congress in providing control legislation with respect to the marketing of milk. So zealous have the courts been in attempting to sustain the order of the Secretary and his determinations with respect to the legality thereof that they have lost sight of the fact, long recognized by this court, that "differentials for quality" are contemplated (*United States v. Rock Royal Co-op.*, 307 U. S. 533 at p. 571) and that prices must be determined which take into account the "price and supply of feed and other pertinent economic conditions" and which "give such commodities a purchasing power equivalent to their purchasing power during the base period" (608e (18)). The base period was fixed by the terms of the order as Aug. 1921-July, 1929, pursuant to Sections 602 and 608e of said Act.

D.

The decision of the Circuit Court herein is directly contrary to decisions of the Court of Appeals of the State of New York upon a state of facts and under Order provisions alike in all material respects.

New York State Guernsey Breeders' Co-operative,
Inc. v. Noyes, 284 N. Y. 197;

New York State Guernsey Breeders' Co-operative,
Inc. v. Noyes, 266 App. Div. 462, App. dismissed,
291 N. Y. 704.